Nos. 18887, 18888

In the United States Court of Appeals for the Ninth Circuit

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

IDAHO SHEET METAL WORKS, INC., A CORPORATION, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO

BRIEF FOR APPELLANT

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INDEX

Page

Statement of Jurisdiction ---- 1
Statement of the Case ---- 2
Specification of Errors ---- 11
Argument
I. Defendant's employees, who fabricate, install, maintain and repair equipment used in producing goods for interstate commerce, are engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act ---- 12
II. Defendant's sheet metal plant does not meet the requirements for exemption as a "retail or service establishment" under sections 13 (a)(2) and (a)(4) of the Fair Labor Standards Act ---- 17
Conclusion ---- 27

CITATIONS

Cases:

Aetna Finance Co. v. *Mitchell*, 247 F. 2d 190 ---- 26
Arnold v. *Ben Kanowsky, Inc.*, 361 U.S. 388 ---- 18, 24, 25
Consolidated Timber Co. v. *Womack*, 132 F. 2d 101 ---- 18
Craig v. *Far West Engineering Co.*, 265 F. 2d 251 ---- 15
Goldberg v. *Eagle Maintenance & Supply Co.*, 194 F. Supp. 27 ---- 20
Goldberg v. *Furman Beauty Supply, Inc.*, 300 F. 2d 16 ---- 25
Goldberg v. *Roberts*, 291 F. 2d 532 ---- 18, 19, 20, 21, 23
Goldberg v. *Sorvas*, 294 F. 2d 841 ---- 20
Goldberg v. *Warren G. Kleban Engineering Co.*, 303 F. 2d 855 ---- 25
Holland v. *Amoskeog Machine Co.* 44 F. Supp. 884 ---- 14, 15
Mitchell v. *Anderson*, 235 F. 2d 638 ---- 15
Mitchell v. *Dooley Bros.*, 286 F. 2d 40 ---- 16
Mitchell v. *Independent Ice & Cold Storage Co., Inc.*, 294 F. 2d 186 ---- 16
Mitchell v. *Kentucky Finance*, 359 U.S. 290 ---- 18, 19, 21
Mitchell v. *Lublin, McGaughy & Asso.*, 358 U.S. 211 ---- 15
Mitchell v. *Mercer Water Co.*, 208 F. 2d 900 ---- 16

717-566—64——1

Cases—Continued — Page

Mitchell v. *H. B. Zachry Co.*, 362 U.S. 310 — 15, 17
Phillips Co. v. *Walling*, 324 U.S. 490 — 18
Sucos. de A. Mayol & Co. v. *Mitchell*, 380 F. 2d 477 — 25
10 East 40th Street Bldg. Co. v. *Callus*, 325 U.S. 578 — 16
Tipton v. *Bearl Sprott Co.*, 175 F. 2d 432 — 15
Walling v. *Amidon*, 153 F. 2d 159 — 14, 15
Roland Electrical Co. v. *Walling*, 326 U.S. 657 — 10, 14, 15, 21, 22, 23
Walling v. *Hamner*, 64 F. Supp. 690 — 14, 15
Walling v. *Sondock*, 132 F. 2d 77, certiorari denied, 318 U.S. 772 — 15
Walling v. *Thompson*, 65 F. Supp. 686 — 15
Willmark Service System, Inc. v. *Wirtz*, 317 F. 2d 486, certiorari denied 375 U.S. 897 — 20
Wirtz v. *Dumont*, 309 F. 2d 152 — 25
Wirtz v. *Shepherd*, 15 WH Cases 901, 47 Labor Cases (C&H) ¶31,432 — 16

Statutes:

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Act of 1949, c. 736, 63 Stat. 910, 29 U.S.C. 201 *et seq.*:
Section 3(j) — 3, 13
Section 6 — 1
Section 7 — 1
Section 13(a)(2) — 3, 7, 11, 17, 24
Section 13(a)(4) — 3, 4, 7, 11, 17, 24
Section 16(c) — 1, 2
Section 17 — 1, 2
28 U.S.C. 1291 — 2
28 U.S.C. 1294(1) — 2

Miscellaneous:

95 Cong. Rec. 11116 — 27
95 Cong. Rec. 12490–1 — 27
95 Cong. Rec. 12501–2 — 27
95 Cong. Rec. 12505 — 23, 26
95 Cong. Rec. 12510 — 27
95 Cong. Rec. 14874–5 — 13, 15
95 Cong. Rec. 14877 — 27
95 Cong. Rec. 14928–29 — 13, 15
95 Cong. Rec. 14942 — 22
1942 WH Manual 326 §§ 29–31 — 21

In the United States Court of Appeals for the Ninth Circuit

Nos. 18887, 18888

W. Willard Wirtz, Secretary of Labor, United States Department of Labor, appellant

v.

Idaho Sheet Metal Works, Inc., A Corporation, appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO

BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

These are two actions brought by the Secretary of Labor under the Fair Labor Standards Act.[1] Section 17 of the Act authorizes the district courts of the United States to restrain violations of the Act, while Section 16(c) authorizes the Secretary of Labor to bring suit on behalf of employees to recover amounts due them under Sections 6 and 7, the minimum wage and overtime provisions of the Act. Accordingly, Cause No. 18887 was brought by the Secretary pursu-

[1] Act of June 24, 1938, c. 676, 52 Stat. 1060, as amended by Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.* The Amendments of 1961 (75 Stat. 65) do not affect the issues in these cases.

ant to Section 17 to enjoin further violations by defendant of the Act's overtime provisions (A5–A6), while Cause No. 18888 was instituted under Section 16(c) to recover unpaid overtime compensation on behalf of defendant's employee, William D. Combs (B1–B6).[2] The two actions were consolidated for trial (A30), at the conclusion of which the district court held that defendant's employees were not within the coverage of the Act, and, further, that defendant's enterprise was an exempt establishment (A58–A61; B24–B27). The district court then made findings of fact and conclusions of law (A58–A61; B24–B27), and entered judgment for defendant in both cases on April 15, 1963, denying the requested relief (A62; B28). Notices of appeal were filed on June 12, 1963 (A63, B29). On September 24, 1963, a motion to consolidate these actions for purposes of appeal was granted by this Court, which has jurisdiction to review the judgments below under 28 U.S.C. 1291 and 1294(1).

STATEMENT OF THE CASE

The facts in these cases are undisputed, many of them having been stipulated and incorporated with the consent of the parties in the district court's pretrial order (A29–A45). It is admitted that during the years 1959 through 1961 defendant did not pay its employees in accordance with the overtime provisions

[2] Page numbers preceded by "A" refer to Volume 1 of the record on appeal in Cause No. 18887; page numbers preceded by "B" refer to the record on appeal in Cause No. 18888; page numbers preceded by "T" refer to the transcript of proceedings at the trial of these cases, which has been designated as Volume 2 of the record of Cause No. 18887.

of the Fair Labor Standards Act (A27, A42, A43), and that this practice has continued thereafter (A43). It was similarly established, in connection with Cause No. 18888, that if the legal issues involved in these cases are resolved in favor of the Secretary, he is entitled to recover $500, plus costs (A44). Thus, the issues on appeal, as at trial, relate to (1) whether defendant's employees, on the basis of work they perform for their employer's customers who produce goods for interstate commerce, are engaged in a "closely related process or occupation directly essential" to such interstate production, so as to bring them within the coverage of the Act;[3] and (2) whether defendant's business is a retail or service establishment exempt from the Act's requirements under Sections 13(a)(2) and 13(a)(4).[4]

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[3] The section of the Act relevant in this regard is Section 3(j) which reads:

"Sec. 3. As used in this Act—

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

[4] The relevant portions of Section 13 read as follows:

"Sec. 13(a). The provisions of sections 6 and 7 [the Act's minimum wage and overtime requirements] shall not apply with respect to * * *

"(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located * * *. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods

The employees involved in these cases are some twelve sheet metal workers at defendant's sheet metal plant in Burley, Idaho, who were engaged in the fabrication, installation, maintenance, and repair of sheet metal products (A30, T31–T35, T44). They did no selling; in fact defendant employed no sales clerks at this plant (T48). These employees worked in a high-ceilinged, one-story cinder block building located about three-quarters of a mile from Burley (T25, T26). The building has a small metal door at the front and a large sliding door through which trucks can be driven (T26, T85). The building is not equipped with show windows, sales counters, or cash registers (T27, T50), but primarily houses workbenches and machinery for cutting and shaping sheet metal, such as a power shear, a power roller, and a power brake (T39–T43).

Although the defendant does some fabrication work for other industries and even for individuals (A39–A40, T45, T50), and, as an "incidental", sells items such as bolts and nuts, elbow conductors, and down spouts (T45), some 83 percent of its gross income during the years 1959 through 1961 ($563,035 out of

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or services (or of both) is not for resale, and is recognized as retail sales or services in the particular industry; or * * *

"(4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided*, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *."

a total of $673,808) was derived from the manufacture, installation, maintenance and repair of equipment for five large potato processors located in the Burley area: J. R. Simplot Company, Shelley Processing Company, Idaho Potato Processors, Inc., Ore-Ida Foods, Inc., and the Great Atlantic & Pacific Tea Company (A31–A36). Such equipment, which admittedly defendant's employees spent a substantial part of their time working on (A31–A36), included vats, storage tanks, elevator buckets, and chutes—all of which are used by the processors in producing dehydrated and frozen potato products for interstate shipment and sales (A31–A36).[5]

None of this potato processing and handling equipment is maintained in stock by defendant; rather it is "made to order" in accordance with the plans and specifications of the particular customer (A41, T48). All of this work is performed on a "time and material" basis, *i.e.,* the amount which defendant charges for a particular job is determined by adding the per hour labor charge to the cost of the materials used (A41), and payment is generally received upon in-

[5] Mr. Wallace J. Carrier of the Shelley Processing Company testified as to several of these types of items and the use made of them by his company. These included a number of receiving tanks, each holding some 5,000 pounds of peeled potatoes, which are located at the ends of the trimming tables in the Shelley plant and help control the feed of the potatoes to the individual processing lines (T11, T13, T35). In addition, the Shelley plant uses elevator buckets and chutes made by defendant for the purpose of transferring potatoes from one processing line to another (T15–T16), while the hoods, some 50 of which are located over the various cookers in the plant, are used to vent steam and vapors through the roof of the plant (T14).

voices presented at various intervals as the work progresses (T23). It was shown that some of the work—both fabrication and installation—was performed in the customer's plant, and on some such occasions, defendant's employees would work side by side with the customer's employees, under the same supervision (T23–T24).

In addition to the 83 percent of its income derived from the foregoing work performed for the five potato processors, defendant, during the same years, 1959 through 1961, obtained another 3 percent of its income ($20,675) from comparable work performed for five other companies similarly engaged in producing goods for interstate commerce. Accordingly, it was stipulated that during these three years defendant's employees spent a substantial amount of their time in fabricating, maintaining and repairing sugar beet processing and sugar manufacturing equipment for the Amalgamated Sugar Co.; working on bins, hoppers, and chutes used by the Burley Flour Mills in the production of flour and millfeed; producing seed handling and processing equipment used by Western Seed, Inc. and Union Seed Co. in processing grasses, grains, and legumes into seed products and animal feeds; and in fabricating and installing plant equipment for the Boise Cascade Container Corporation (A36–A39).

It was defendant's contention that none of the foregoing work brought its employees within the coverage of the Act as being engaged in activity closely related and directly essential to the interstate production of its customers, and the district court agreed, concluding

that "employment in a local business such as we have here" is not within the Act's coverage (A55).

In addition, as an affirmative defense, defendant claimed that its plant was a "retail or service establishment" and therefore exempt from the requirements of the Act under Sections 13(a)(2) and 13(a)(4). While these two sections impose a number of distinct requirements which must be met in order to qualify for exemption, the parties' stipulation limited the issue to the following three: (1) Whether defendant's business is by its nature outside the retail concept and hence not the type of establishment to which the exemption could be applicable; (2) whether defendant's establishment is recognized as a retail establishment in the industry in which defendant is engaged; and (3) whether 75 percent of defendant's sales of goods and services is recognized as retail in the industry in which defendant is engaged (A43–A44).

Defendant's evidence on this score was presented by five witnesses consisting of defendant's lawyer-accountant (Vestal Coffin), defendant's general manager (Clifford P. Jackson), defendant's president (Herbert Shockey), and two salesmen who sell metal products to defendant (Roderick Law and Lynn A. Lake).

Mr. Coffin testified that he considered establishments such as defendant's to be "custom retail and service establishments" (T73), which he believed to have evolved from the "early tin shop" found in hardware stores around 1900 and with which he was familiar as a boy because of his father's part ownership of a hardware store (T68–T72). He acknowl-

717-566—64——2

edged, however, that there are "marked differences" between defendant's operation and that of the traditional tin shop, in that the present type of business is "immensely larger" and the type of product is "larger in size and much higher in price" (T75). While he stated that the customers of the two types of institutions are the same, he did not know whether the tin shop ever did up to 86% of its dollar volume with only five customers as does defendant in this case, nor did he think that the general manager of one of the largest potato processing companies ever came into the tin shop to have a 5,000 pound steel tank made (T75–T76). Mr. Shockey, defendant's president, stated that he regarded his business as a "retail sheet metal shop", apparently because "[e]very job we do is to the customer's specific recommendation and to his personal use" (T50). With reference to his belief that his plant exists to serve the general public he indicated that the number of sales (as distinguished from dollar amount) "to the general public" constituted approximately 60 percent, while sales to processing customers constituted 40 percent (T64–T65).

The three other witnesses called by defendant testified that defendant's establishment is considered as a retail establishment in the industry, but none explained the basis for such alleged recognition (T80, T89–T90, T94–T95).

The foregoing testimony of defendant's witnesses related to the question of whether the establishment itself was recognized as retail in the industry; there was, however, no testimony on their part as to the separate and distinct test of whether at least 75%

of the sales of the establishment were recognized as retail in the industry. While, as already noted, defendant's president differentiated between sales "to the general public" and sales to processing customers, neither he nor any of the defendant's witnesses testified that the latter category of sales, which amounted to some 86% of defendant's dollar volume, were recognized as retail. On the other hand, the Secretary's witness, Dr. Harrison L. Grathwohl, Associate Professor of Marketing at the University of Washington, whose experience included consulting work in the areas of wholesaling and retailing, testified to his opinion, based upon the application of accepted marketing concepts, that the work performed for Shelley Processing Co. and J. R. Simplot Co. was not recognized as retail sales in the sheet metal industry (T100–T101). This conclusion, he explained, was reached on the basis of the amounts consumed by such customers, the character of such customers as manufacturers, and the fact that the sale of goods produced to prior specification is more characteristic of manufacturing than retailing (T102–T104).

In addition to testifying that such sales were not recognized as retail, Dr. Grathwohl also testified with respect to the additional exemption test—whether defendant's establishment itself was recognized as a retail establishment in the industry. In concluding that it was not, he pointed to the allocation of defendant's employees to fabricating work rather than to selling; the fact that defendant's premises are physically devoted to fabricating rather than to selling activities; the heavy distribution of its sales to

five or fewer customers; the fact that defendant's establishment is primarily concerned with adding a manufactured value to the goods it sells, rather than the "time, place and position" utility which is typical of retailing; and its predominant engagement in selling industrial goods to industrial customers (T105–T110). He also noted that the Standard Industrial Classification, arrived at by government agencies as well as industry representatives—such as Dunn and Bradstreet, research bureaus and trade associations—classifies sheet metal work as manufacturing.[6]

Despite this analysis the district court concluded that defendant's establishment is recognized as a retail establishment "as shown by the testimony of the manager of defendant corporation and representatives of companies selling materials to defendant" (A56, A60). The court also concluded that 75% of defendant's sales are recognized as retail sales or services (A60), although its opinion does not indicate the basis for this holding. The court further expressed the view that cases, such as *Roland Electrical Co.* v. *Walling,* 326 U.S. 657, cited by the Secretary to establish that defendant's business is not within the retail concept, were distinguishable or inapplicable (A56).

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[6] The Standard Industrial Classification Manual, published by the Bureau of the Budget, lists "Sheet Metal Work" in its chapter on "Manufacturing", under Industry No. 3444, and states that this classification includes "Establishments primarily engaged in manufacturing sheet metal work for buildings * * * and manufacturing sheet metal stovepipes, light tanks, etc."

SPECIFICATION OF ERRORS

The court below erred:

1. In finding [Fdg. VI (A59, B25)] that defendant's business is not closely related or directly essential to the production of goods for commerce; and in concluding [Concl. II (A60–A61, B26–B27)] that defendant is not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

2. In failing to conclude that appellee's employees are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

3. In finding [Fdg. V (A59, B25)] that all of defendant's sales and services were on a retail basis.

4. In finding [Fdg. IV (A59, B25)] that sales and services to the processing companies "were for the most part made and rendered intermittently and/or during the 'down' season."

5. In finding that appellee's establishment, and 75% of its sales of goods or services, are recognized as retail in the particular industry in which it is engaged [Fdg. X (A60, B26)].

6. In concluding that appellee's business meets all the tests of a retail establishment and is therefore entitled to exemption under Sections 13(a)(2) and 13(a)(4) of the Fair Labor Standards Act [Concl. III (A61, B27)].

7. In concluding that appellee's employees are exempt from the provisions of the Fair Labor Standards Act by reason of their employment by a retail and service establishment [Concl. IV (A61, B27)].

8. In dismissing the complaint in Cause No. 18887 [Concl. V (A61)] and failing to grant the injunction prayed for.

9. In dismissing the complaint in Cause No. 18888 [Concl. V (B27)] and failing to enter judgment in favor of the Secretary in the amount of $500.

ARGUMENT

I. Defendant's employees, who fabricate, install, maintain and repair equipment used in producing goods for interstate commerce, are engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act

As shown by the admitted facts in this case 86% of defendant's income for the years 1959 through 1961 was obtained from the fabrication, installation, maintenance, and repair of industrial equipment specifically designed for use by various factories processing goods for interstate commerce (A31–A39; see Statement, *supra*, pp. 4–6).[7] That the engagement of its employees in such work is "closely related" and "directly essential" to the production of goods for commerce, and is thus within the coverage of the Act, is settled beyond doubt by the legislative history of the revelant statutory provision as well as authoritative judicial decisions directly in point here.

The "closely related" and "directly essential" terminology was introduced into the Act when Con-

[7] While the court found that such services were for the most part rendered "intermittently" or during the "down season" (A59, B25), it is clear from the stipulated figures that in the aggregate the work performed for the ten processing companies must inevitably have represented the most regular and predominant part of defendant's activity.

gress amended the statutory definition of "produced" in 1949.[8] That this amended language was intended to include employees performing work of the type involved here is abundantly clear from the conference statements submitted to both Houses together with the proposed amendments. Thus, the Statement of the Majority of the Senate Conferees, in a detailed list of "typical" employees who would remain within the Act's coverage under the amended language, included employees engaged in "[p]roduction of tools, dies, designs, patterns, machinery, machinery parts, mine props, industrial sand, or other equipment used by the purchaser in producing goods for interstate commerce", as well as employees "repairing, maintaining, improving, or enlarging the buildings, equipment or facilities of producers of goods" (95 Cong. Rec. 14874–75). To similar effect is the House Managers' Statement, which pointed out that the amendment would "not affect the coverage under the act of employees * * * who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce" (95 Cong. Rec. 14928–29).

The Congressional intent was made further explicit by the specific approval in the Senate report (95 Cong. Rec. 14874–75) of a number of decisions reached under

[8] The definition appears in Section 3(j), quoted in full, *supra*, fn. 3, p. 3. Before the amendment, the pertinent portion read: "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in * * * *any process or occupation necessary to the production thereof*, in any State." The 1949 amendment changed the italicized words to read: "or in any closely related process or occupation directly essential to the production thereof".

the previous "necessary to production" language, including *Roland Electrical Co.* v. *Walling,* 326 U.S. 657; *Walling* v. *Amidon,* 153 F. 2d 159 (C.A. 10); *Holland* v. *Amoskeog Machine Co.,* 44 F. Supp. 884 (D.N.H., 1942); *Walling* v. *Hamner,* 64 F. Supp. 690 (W.D. Va., 1946). These approved decisions are clearly indistinguishable from the instant case.

Thus, in *Roland Electrical,* where the employer was an independent enterprise engaged in the reconstruction, repair, and sale of electric motors and the installation of electrical wiring, coverage was upheld since 31 of the employer's miscellaneous active accounts—providing less than 35% of the employer's income (see Court of Appeals decision, 146 F. 2d 745, 746)—were shown to be engaged in producing goods for commerce. To the same effect are the decisions in *Amidon, supra,* where the defendant, a local sand and gravel company, sold blended sand to a steel company for use as lining material to protect from heat equipment used in producing steel products; *Amoskeog Machine Co., supra,* in which maintenance men, such as sheet metal workers and electricians, employed by the defendant, were engaged in repairing machinery for their employer's customers, some of whom were manufacturers of goods for commerce; and *Hamner, supra,* where the employees of a saw mill produced mine props sold to local coal mines for use as roof supports during mining operations.

The contrary decision below, denying the Act's coverage of employees performing work so obviously within the ambit of the above authorities, appears to rest principally upon the trial court's conclusion that

defendant is a "local business", not itself engaged in interstate operations (A54–A55). It is, however, well settled that the Act's application in a particular case "turns upon the nature of the employees' duties, and not upon the nature, local or interstate, of the employer's general business." *Mitchell* v. *H. B. Zachry Co.,* 362 U.S. 310, 315. See also *Mitchell* v. *Lublin, McGaughy & Asso.,* 358 U.S. 207, 211, as well as this Court's decisions in *Mitchell* v. *Anderson,* 235 F. 2d 638, 641, certiorari denied 352 U.S. 926; *Craig* v. *Far West Engineering Co.,* 265 F. 2d 251, 254; and *Tipton* v. *Bearl Sprott Co.,* 175 F. 2d 432, 435. That the 1949 amendment preserved this basic principle is demonstrated by the explicit statements in both the House and Senate reports that employees performing work of the type discussed would remain covered "whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer" (95 Cong. Rec. 14874–75, 14929), as well as by the express approval of such decisions as *Roland Electrical, Amoskeog Machine Co., Hamner,* and *Amidon, supra,* p. 14 all of which involved similarly "local businesses" serving a miscellany of customers.[9]

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[9] Other decisions, comparable in this respect, which were approved in the Senate report (95 Cong. Rec. 14874–75) include *Walling* v. *Sondock*, 132 F. 2d 77 (C.A. 5), certiorari denied 318 U.S. 772, holding the Act applicable to employees of an independent watchmen service agency, although only 20% (59 out of 254) of the agency's regular customers were engaged in interstate commerce or in the production of goods for commerce (see the district court opinion, 43 F. Supp. 339, 340); and *Walling* v. *Thompson*, 65 F. Supp. 686 (S.D. Cal.), upholding coverage of employees of a firm engaged in the instal-

Neither of the cases relied upon by the trial court—both of which turned upon the remoteness from interstate production of the employees' work rather than the nature of their employer's business—are in point here. *10 East 40th Street Bldg. Co.* v. *Callus,* 325 U.S. 578, dealt with maintenance employees who were not serving production facilities at all, but rather an office building in which office space was leased to a miscellany of tenants some of whom were engaged in the production of goods *elsewhere.* In holding the Act inapplicable because of the "remoteness of [their] occupation from the physical process of production" the Supreme Court carefully distinguished the situation from other cases where the employees,

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lation, repair and maintenance of burglar alarm systems leased to a general miscellany of local customers, only 7.5% of whom were engaged in the production of goods for commerce.

Among the numerous similar decisions after 1949 are *Mitchell* v. *Independent Ice & Cold Storage Co., Inc.*, 294 F. 2d 186 (C.A. 5), certiorari denied 368 U.S. 952, holding within the Act employees of an ice plant, "a very small percentage" of whose ice was delivered to local shrimp packers for preservation of shrimp products prior to interstate shipment; *Mitchell* v. *Dooley*, 286 F. 2d 40, 44 (C.A. 1), certiorari denied 366 U.S. 911, applying the Act to employees of a waste removal service whose customers included producers for commerce as well as "local businesses and private homes"; *Mitchell* v. *Mercer Water Co.*, 208 F. 2d 900 (C.A. 3), sustaining coverage of employees of local utility companies, some of whose gas and water was furnished to concerns manufacturing products for interstate commerce; and *Wirtz* v. *Shepherd*, 15 WH Cases 901, 902, 47 Labor Cases ¶31,432 (M.D. Fla., 1963, not officially reported), holding within the Act employees of "an independent welding and machine shop" serving "various commercial, industrial, and private customers," whose duties included working on equipment used by growers and processors of citrus fruits.

like those of defendant in the present case, were engaged in providing service to facilities "concededly devoted to manufacture for commerce" (325 U.S. 580, 583). Similarly, in *Mitchell* v. *H. B. Zachry Co.,* 362 U.S. 310, the Court, in rejecting coverage of employees engaged in constructing impounding facilities to augment a municipal water supply system, pointed out that the employees were working on "neither a facility of 'commerce' nor a facility of 'production' ", and emphasized the remoteness of their dam construction work from the production activities of those who would be supplied with water from the completed dam (362 U.S. at 319). In the instant case, on the other hand, where the employees were working on the actual equipment specifically intended for use in producing goods for commerce, there is no basis for any comparable concern as to "remoteness" such as led to the closely divided (5 to 4) decisions in the two foregoing cases.

II. Defendant's sheet metal plant does not meet the requirements for exemption as a "retail or service establishment" under Sections 13(a)(2) and 13(a)(4) of the Fair Labor Standards Act

Section 13(a)(2) of the Act provides an exemption from the minimum wage and overtime requirements for a "retail or service establishment" if, among other conditions, 75% of the establishment's annual dollar volume of sales of goods or services is "recognized as retail sales or services in the particular industry." Section 13(a)(4) extends this exemption to a retail or service establishment which makes or processes the goods it sells, provided that it "qualifies as an exempt

retail establishment under [Section 13(a)(2)]", and meets certain additional tests. Among these additional tests is the requirement that the employer's establishment be "recognized as a retail establishment in the particular industry."[10] It is settled that the employer has the burden of proving each of these conditions for exemption, which must be "narrowly construed against the employer * * * and limited to those * * * plainly and unmistakably within their terms and spirit." *Phillips Co.* v. *Walling*, 324 U.S. 490, 493; *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295; *Consolidated Timber Co.* v. *Womack*, 132 F. 2d 101, 106 (C.A. 9).

Defendant's plant cannot "qualify as an exempt retail establishment" under Section 13(a)(2) since, under the principles of *Mitchell* v. *Kentucky Finance Co.,* 359 U.S. 290, and *Goldberg* v. *Roberts,* 291 F. 2d 532 (C.A. 9), this business does not fall within the "concept" of retail contemplated by that section. In addition to not meeting this threshold requirement, defendant has failed to sustain its burden of proving that it meets the two distinct "recognition" tests quoted above, both of which are "explicit prerequisites to exemption" (*Arnold* v. *Ben Kanowsky, Inc., supra,* 361 U.S. at 392).[11]

1. The grounds on which the Supreme Court ruled, in *Mitchell* v. *Kentucky Finance Co.,* 359 U.S. 290, that personal loan companies were not within the

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[10] These sections are quoted in full, *supra*, p. 3, fn. 4.

[11] The various other tests prescribed by Sections 13(a)(2) and 13(a)(4) are not in issue here, since it was stipulated that they have been met.

amended exemption, and upon which this Court similarly ruled in *Goldberg* v. *Roberts,* 291 F. 2d 532, with respect to "letter shops", are, we submit, equally applicable to require reversal of the district court's decision in the instant case. Noting, in *Kentucky Finance,* that "[b]efore 1949 the Administrator, in interpreting the term 'retail or service establishment', then nowhere defined in the statute, had * * * exclud[ed] from the coverage of the exemption personal loan companies and other financial institutions" (359 U.S. at 293), and pointing out that "[w]hen Congress amended the Act in 1949 it provided that the pre-1949 rulings and interpretations by the Administrator should remain in effect unless inconsistent with the statute as amended" (*id.* at 292), the Court said:

> The narrow issue before us, then, is whether Congress in the 1949 amendment of § 13(a)(2) broadened the scope of that section so as to embrace personal loan companies (*ibid.*).

The Court, in answering this question in the negative, explicitly rejected the employer's claim that it was the intent of Congress to exempt any "local" business which could prove it met the enumerated criteria specified by the 1949 amendment (*id.* at 292), stating:

> We find nothing in the debates or reports which suggests that Congress intended by the amendment to broaden the fields of business enterprise to which the exemption would apply. Rather, it was time and again made plain that the amendment was intended to change the prior law *only* by making it possible for business enterprises *otherwise eligible under exist-*

> *ing concepts* to achieve exemption * * *. [359 U.S. at 294, emphasis added.]

This ruling was followed in the *Roberts* decision where this Court, quoting from the lower court's opinion in that case, noted that "where it has been established by pre-amendment [*i.e.,* pre-1949] interpretation that an industry is not retail, unless that classification was due to an application of the business use test,[12] that industry is not now exempt", and pointed out that with respect to such businesses it is not necessary to "reach the point of applying" the percentage tests set forth in the exemptive section (291 F. 2d at 533–534).[13]

These decisions are thus dispositive of the instant case since defendant's business, like "personal loan companies" and "letter shops" was among the categories of business enterprise not "eligible under existing concepts to achieve exemption", as demonstrated not only by the pre-1949 administrative rulings, but also by pre-1949 judicial determination whose continuing vitality was explicitly confirmed in the legislative history of the 1949 amendment.

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[12] As indicated *infra*, pp. 21–23, the non-exempt classification relevant to the instant case did not depend on the fact that sales were made for business uses, but rather upon the non-retail character of establishments primarily engaged in working on industrial equipment.

[13] To similar effect are *Goldberg* v. *Sorvas*, 294 F. 2d 841 (C.A. 3) and *Willmark Service System, Inc.* v. *Wirtz*, 317 F. 2d 486 (C.A. 8), certiorari denied 375 U.S. 897, both holding that "shopping services" engaged in reporting to retail stores on the honesty and efficiency of their clerks are outside the "retail concept"; and *Goldberg* v. *Eagle Maintenance & Supply Co.*, 197 F. Supp. 27 (S.D. Calif., 1961), reaching the same conclusion with respect to an employer furnishing janitorial services to various buildings and industrial concerns.

The nonexempt "pre-amendment status" of defendant's type of business was in fact established by the very same paragraphs of the "pre-1949 rulings and interpretations by the Administrator" relied upon by the Supreme Court in *Kentucky Finance* and by this Court in *Roberts* (1942 Wage and Hour Manual, p. 326 §§ 29–31; see also 359 U.S. at 292, fn. 1, and 291 F. 2d at 534), which listed types of businesses which "are not in the ordinary case sufficiently similar in character to retail establishments" to qualify for exemption under § 13(a)(2). (1942 Wage and Hour Manual, pp. 334–335). The list included, along with "personal loan companies" and "duplicating, addressing, and mailing list establishments", businesses such as "machine shops and foundries", "industrial blacksmiths", "establishments engaged in sharpening and reconditioning industrial tools", "establishments engaged in armature rewinding"—all of which are obviously engaged primarily in furnishing or maintaining the equipment used by others in manufacturing and processing operations, and are thus indistinguishable from the present defendant's enterprise.

The non-exempt status of such businesses involved mainly in working on equipment designed and limited for use by industrial and commercial customers was confirmed by the Supreme Court's holding in *Roland Electrical Co.* v. *Walling,* 320 U.S. 657. The Court there ruled that an enterprise engaged in the closely parallel work of selling and repairing electrical equipment and installing electrical wiring for industrial, commercial, and private customers, could not qualify for the retail exemption since its commercial and in-

dustrial customers were "not 'retail' customers in the same sense as is the customer of the local merchant, local grocer or filling station operator" (326 U.S. at 661, 678).

While Congress in 1949 disapproved the broader implications of the Supreme Court's reasoning in *Roland Electrical,* that "*no* business sale can be classified as a retail sale" (95 Cong. Rec. 14931, 12508), the Supreme Court's *holding* was explicitly approved. Thus, Representative Lesinski, (one of the Managers for the House) explained that reference in the House Managers' Statement to *Roland Electrical* "should not mislead anyone into concluding that the conferees intended to reverse or nullify that decision" (95 Cong. Rec. 14942), and pointed to the following language from the House Report:

> The amendment also does not exempt an establishment engaged in the sale and servicing of manufacturing machinery and manufacturing equipment used in the production of goods, because the sale and servicing of such equipment have never been recognized as retail selling or servicing in the industry which distributes or services that type of equipment. [95 Cong. Rec. 14932]

Similar assurances were given in the Senate where Senator Holland (the main sponsor of the amendment in the Senate) explained that the legislative objection was only to "the dicta" in the *Roland Electrical* opinion, and pointed out that "In that case the business was that of furnishing machinery and repairing and keeping up electrical machinery for a manufacturing enterprise, which involved services which, by their

very nature, are not to be rendered to every Tom, Dick and Harry, but which are available only to and used only by large manufacturers with large investments in factories containing large amounts of electrical equipment" (*ibid.*). And later, in answer to the specific question whether the *Roland Electrical* case would "be decided any differently under the proposed amendment", Senator Holland flatly answered "definitely not" (95 Cong. Rec. 12505). Consistent with Senator Holland's statements was the Senate Conferees' report which stated that the amendment did not change the status of establishments "selling industrial goods and services to manufacturers engaged in the production of goods for interstate commerce and to other industrial and business customers (such as the establishment in *Roland Electrical Co.* v. *Walling* (326 U.S. 657) * * *." [95 Cong. Rec. 14877]

It is therefore clear from the pre-1949 administrative rulings and judicial interpretation that defendant's type of establishment, primarily engaged in producing and repairing equipment used by others in the production of goods for commerce, was not among the "business enterprises otherwise eligible under existing concepts" for whose benefit the 1949 amendment was enacted (*Mitchell* v. *Kentucky Finance Co.*, 359 U.S. at 294), and that such non-exempt status was explicitly confirmed by Congress at the time of such enactment. Accordingly, as in *Kentucky Finance* and *Roberts,* this alone suffices to defeat defendant's claim to exemption, without need to inquire into the specific tests prescribed by the 1949 amendatory language.

2. While the foregoing authorities establish the non-exempt status of defendant's business without the need to consider the other statutory tests, we submit that the district court was also in error with respect to the two "recognition" tests, for on this record defendant plainly failed to sustain its burden of proving both that 75% of its sales "is recognized as retail sales or services in the particular industry", as required by § 13(a)(2), and that its establishment "is recognized as a retail establishment in the particular industry", as required by § 13(a)(4).[14]

Thus, there is no testimony to support the district court's finding that 75% of defendant's sales are recognized as retail sales, for although defendant's witnesses testified that they considered defendant's type of *establishment* to be of a retail nature and that it was so regarded in the industry, none testified that any or all of defendant's sales were recognized as retail in the industry. In particular, there was no testimony that any specified portion of the work performed for the processing companies—which even defendant's president appears to have thought of as distinct from sales to the "general public" (T65), and which, as the record shows, amounted to as much as $180,000 in 1960 to a single customer (A32)—was recognized in the industry as retail sales or services.

[14] These two tests represent, of course, separate and distinct prerequisites to exemption. As the Supreme Court pointed out in *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, the conditions of § 13(a)(2) "are explicit prerequisites to exemption, not merely suggested guidelines," and such criteria, "as they are incorporated by reference in § 13(a)(4)" must be met, "as well as the additional requirements of § 13(a)(4) itself" (361 U.S. at 392-393).

Indeed, the only testimony on this point was that of an authority in the field of marketing, Dr. Grathwohl who, applying standard marketing concepts to the sales made to J. R. Simplot Co. and the Shelley Processing Co., concluded that such sales are not recognized as retail (See Statement, *supra*, p. 9).

Thus, as in the *Kanowsky* case, *supra,* "[t]he court below assumed that [defendant's] sales were recognized in the community as retail sales without any evidence to support the fact" (301 U.S. at 388). As the Supreme Court there ruled "This conclusion was not justified, since it is clear that Congress intended that 'any employer who asserts that his establishment is exempt must assume the burden of proving that at least 75 percent of his sales are recognized in his industry as retail' " (*ibid.*).

Recent decisions of the Courts of Appeals, following the *Kanowsky* decision, have emphasized the employer's burden of furnishing specific and precise proof that the exemption's percentage requirements are met. See *Goldberg* v. *Furman Beauty Supply, Inc.,* 300 F. 2d 16 (C.A. 3); *Wirtz* v. *DuMont,* 309 F. 2d 152 (C.A. 4); *Sucrs. de A. Mayol & Co.* v. *Mitchell,* 380 F. 2d 477 (C.A. 1), certiorari denied 364 U.S. 902; *Goldberg* v. *Warren G. Kleban Engineering Corp.,* 303 F. 2d 855 (C.A. 5). In *Furman, supra,* the Third Circuit, referring to the employer's failure to adduce proof that one of its categories of sales was recognized as retail, held that "[t]his deficiency is fatal", since "the statute exacts a requirement turning on a precise percentage of annual sales revenue" (300 F. 2d at 18).

The district court's conclusion that 75% of defendant's sales are regarded as retail is contrary not only to the testimony actually adduced on this issue, but also to the legislative history which plainly shows that in adopting this test, Congress obviously assumed that in no industry would the sale or servicing of equipment used in producing goods for commerce be recognized as retail sales. See discussion, *supra.* pp. 22–23, as well as Senator Holland's statement that "[t]he sale and servicing of manufacturing machinery and manufacturing equipment used in the production of goods is not regarded as retail selling or servicing in the industry which distributes or services that type of equipment" (95 Cong. Rec. 12505).

Defendant's evidence was also inadequate to sustain its burden of proving "plainly and unmistakably" that its establishment is recognized as retail in the industry. The testimony on this score simply represented the subjective and largely self-serving conclusory opinions of its witnesses, unsupported by any showing that the industry had, in some objective, observable manner, treated this type of establishment as retail. The trial court's reliance upon such testimony, to the exclusion of the more objective interpretations of the Administrator and the testimony of plaintiff's well qualified witness, was inconsistent with the repeated disavowal by its sponsors that the "industry recognition" language was intended "to permit each industry to decide for itself whether it was conducting a 'retail or service establishment' within the meaning of the exemption" (*Aetna Finance Co.* v. *Mitchell*, 247 F. 2d 190, 193), and their assurances

that the more objective views of others, and particularly of the Administrator, were to be given weight. (See 95 Cong. Rec. 12501–12502, 12510, 14877, 11116.) Moreover, the inadequacy of defendant's testimony on this score is conclusively demonstrated by the fact that Congress, as we have shown, enacted the "industry recognition" language under the explicit assumption that establishments such as this defendant's would not be recognized as retail in any industry.

CONCLUSION

The judgments below should be reversed, and the cases remanded for the issuance of an injunction in No. 18887, and for entry of judgment in favor of the appellant in No. 18888 in the amount of $500.00 plus costs.

Respectfully submitted.

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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